

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 ALFONSO HERNANDEZ,

4 PLAINTIFF,

5 vs.

NO: CV-14-964 KG/SCY

6 ANDY FITZGERALD,

7 DEFENDANT.

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10 TRANSCRIPT OF EXCERPT FROM THE TRIAL - VOLUME II

11 BEFORE THE HONORABLE KENNETH J. GONZALES

12 Wednesday, May 29, 2019; 8:27 A.M.

13 ALBUQUERQUE, NEW MEXICO

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12 Ms. Kaia Oliveros
13 Mr. Alfonso Hernandez
14 Mr. Andy Fitzgerald
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THE COURT: Okay. Good morning, everyone. All right. Please be seated.

Okay. We are back on the record, and I understand the jury's just about ready to come back in, but is there anything that counsel wants to bring up while we're here?

MS. MARTINEZ: Yes, Your Honor.

THE COURT: Okay.

MS. MARTINEZ: Do you want to go first, Louren? You had something to raise with the Court.

MS. OLIVEROS: You can go on.

MS. MARTINEZ: All right, Your Honor. So the main issue that I wanted to address was the issue of counsel questioning my client yesterday about whether or not the judgment would be paid by the City of Albuquerque in front of the jury, and I did have an opportunity yesterday, last night to speak with my client and do a little bit of research, Your Honor, and I did look at Rule 411, which I believe that conduct violates, and Rule 411 states that evidence that a person was or was not insured against liability is not admissible to prove that the person acted negligently or otherwise wrongfully, but the Court may admit this evidence for another purpose.

This Court questioned counsel about the reason that she questioned my client on the issue, and she stated that, you know, because he'd been reinstated in 2019 this was fertile

1 grounds for cross-examination, but the reasons set forth by
2 counsel don't satisfy what's required by Rule 411, and so my
3 client is unfairly prejudiced by the conduct.

4 Unfortunately, because the City is not a party in
5 these proceedings, when we conducted voir dire there was no
6 questions asked about the City of Albuquerque bias or prejudice
7 for the City of Albuquerque, for or against, and whether any of
8 the jurors had been employed by the City of Albuquerque or had
9 a family member or had any adverse feelings toward the City of
10 Albuquerque, and my understanding is that typically when the
11 City is a party there's a special jury questionnaire that is
12 requested because the City's in the news so often for a variety
13 of issues. And obviously that wasn't done in this case. And
14 so the defendant is unfairly prejudiced and his right to a fair
15 and impartial jury has been compromised.

16 I believe that this issue falls within this Court's
17 sound discretion and this Court has the ability to determine
18 the appropriate remedy.

19 I spent some time attempting to draft a limiting
20 instruction, Your Honor, but the problem with the limiting
21 instruction is that it really doesn't cure the prejudice,
22 because it just raises the issue with the jury once again that
23 they can't consider that in making their determination. And I
24 don't understand how it's possible to unring that bell.

25 So, I believe that, you know, that this issue is left

1 to this Court's discretion to determine the appropriate
2 sanction, and I think the appropriate sanction based on not
3 just this issue, but plaintiff's behavior throughout this
4 litigation, and I think that that is very well-documented in
5 this Court's order, document number 110, and this Court's order
6 adopting that recommendation by the magistrate, document 111,
7 and then the conduct here at this jury trial, violations of
8 this Court's motions -- orders in limine and then this
9 violation of Rule 411.

10 So while we leave this issue to the Court's
11 discretion, we suggest to the Court that the dismissal of this
12 case at this time is appropriate, because a mistrial would just
13 force this defendant to come back from Chicago, incur
14 additional costs, take more time from work, and it would cause
15 the defendants to incur additional costs and fees. But the
16 dismissal is appropriate based on all of the misconduct that's
17 taken place in this case thus far.

18 And alternatively, Your Honor, the defendant requests
19 that if this Court is unwilling to dismiss this matter, that
20 the Court consider as an appropriate remedy the dismissal of
21 plaintiff's claims for punitive damages, because that would
22 cure the prejudice because the plaintiff would not be entitled
23 to ring the bell against the City of Albuquerque with regard to
24 that statement, which was -- which can be the only basis that
25 that statement was made.

1 And so, Your Honor, we leave this issue to the
2 Court's discretion, but we do raise the fact that the defendant
3 has been unfairly prejudiced, he will not be able to obtain a
4 fair trial based on the comments of counsel, and so we ask for
5 the relief that the Court deems appropriate.

6 THE COURT: Okay. And just to be -- just to be
7 clear, the draft limiting instruction you have, you've
8 submitted, I have it in my hand, this relates -- and I'll just
9 read it. So is it filed?

10 MS. MARTINEZ: It is filed, yes, Your Honor.

11 THE COURT: It is on the record? I don't have a
12 document number.

13 MS. MARTINEZ: I'm sorry.

14 THE COURT: That's all right.

15 MS. MARTINEZ: I thought the one I gave had a
16 document number. It's document number 275, Your Honor.

17 THE COURT: 275?

18 MS. MARTINEZ: Yes.

19 THE COURT: Okay. Okay, Theresa I see it. Okay, so
20 275.

21 MS. MARTINEZ: 275 relates to the violation of the
22 order in limine, Your Honor.

23 THE COURT: Yes. Relating to the personnel file.
24 Now, the draft limiting instruction relating to any judgment
25 that would be paid.

1 MS. MARTINEZ: I was unable to craft one, Your Honor,
2 because I worry that bringing it to the jury's attention again
3 just highlights the issue.

4 THE COURT: Okay.

5 MS. MARTINEZ: When the comment was made in the
6 courtroom when the question was asked, I objected but didn't
7 put any grounds on the record to try to not draw attention to
8 it.

9 THE COURT: Sure.

10 MS. MARTINEZ: And so I'm -- I'm weary of drawing
11 additional attention to this issue to the jury, and that's what
12 I struggled with last night.

13 THE COURT: Okay. Ms. Oliveros, do you want to
14 respond to anything that Ms. Martinez has proposed?

15 MS. OLIVEROS: Well, Your Honor, she -- there was a
16 lot packed in there, Your Honor. One, if the motion is to
17 dismiss, I obviously strenuously object, and I think I need to
18 go to the alleged many violations of the motions in limine,
19 Your Honor. One, with respect to the questions about the City,
20 the question that I did with Mr. Fitzgerald had to do with his
21 reporting and his dishonesty that he demonstrated with respect
22 to reporting incidents where he used force, and what he did
23 when he testified was that he said that he always reports
24 everything and that he's -- that he thinks -- I don't have
25 the -- I don't have the transcript, but I obviously I need to

1 get it, Your Honor, but that he has never omitted anything from
2 it -- from his required documentation, which were the daily
3 reports or the incident reports. And because he was lying
4 about that, then he -- then I believed, as I mentioned
5 yesterday, that he opened the door, and I didn't see on the
6 order that I had to approach the bench, Your Honor, and I think
7 that that would have been best now that this has come up, but
8 he ordered -- he opened the door, and then I was asking
9 questions about actually times that he omitted things and he
10 agreed to them. That questioning went on, Your Honor, and I
11 submit that I -- if there was an objection raised, which there
12 never was, it was only the Court that brought it forward, but
13 if there was an objection raised in the beginning, if the Court
14 or the defense counsel found that that line of questioning
15 exceeded the bounds of what was permissible, I needed the
16 opportunity and chance to cure, and then obviously I would have
17 stopped it right then, and because of the way the evidence
18 works in the courtrooms it's oftentimes that the door's opened
19 to things that weren't otherwise admissible before.

20 THE COURT: But you would acknowledge that it is at
21 least best practice to flag it for the Court before you proceed
22 with that line of questioning?

23 MS. OLIVEROS: Well, I would, Your Honor, and I think
24 that, you know, obviously, that's what I should have done, and
25 it's hard, because in hindsight, you know, you have told me

1 that I am to have a hearing on sanctions, but I think that's
2 the best practice. It's my practice that if the -- if there
3 was an instruction by the Court that I should do that, that I
4 do that, and I take all of the orders very seriously, but also
5 when there's an opportunity for evidence to change, like
6 someone lying on the stand, my understanding on the Rules of
7 Evidence, Your Honor, is that opens the door so that the --
8 that, you know, when -- that then becomes a permissible ground
9 to question about someone. They can't stand on a falsehood
10 even though the Court has preliminarily without the testimony
11 excluded the evidence for the reasons that are set forth in the
12 motion.

13 THE COURT: The questions also included whether he
14 would hold any strong feelings about the defendant based on the
15 fact that Mr. Fitzgerald -- or the plaintiff based on
16 Mr. Fitzgerald being terminated by the City of Albuquerque.

17 MS. OLIVEROS: Yes. And, Your Honor, we filed a
18 motion, and I just want to make sure the way I understood the
19 state of the evidence was we tried to get in as an exhibit the
20 City of Albuquerque's admissions regarding the termination.

21 THE COURT: I ruled -- I ruled on those admissions,
22 excluding those.

23 MS. OLIVEROS: Yes, and I didn't mention them. But
24 they were not -- they were not the only avenue for talking
25 about his termination. I think his termination, just like

1 Mr. Powdrell's termination, came to be relevant about his
2 testimony, whether it's bias for the City -- or bias for
3 allegations having to do with the City and his employment there
4 or against the City, and it's the same thing with
5 Mr. Fitzgerald. If he has -- If he has a bias against my
6 client, that influences the way he might testify. And his
7 deposition, the admissions of the City were one thing, but in
8 his deposition he makes it clear that he holds my client
9 responsible for everything in his life that went bad in that
10 time period, and that's something -- that's a bias that he has
11 against my client that influences how he testifies.

12 Now, his termination from the City, or -- which we've
13 only learned about from supplemental disclosures made by
14 Ms. Martinez after the first -- over the weekend, I believe it
15 was, that there was a -- there was a settlement or a decision
16 by the City or the union or whatever it was to switch him from
17 being terminated to resigning and then there was a \$5,000
18 payment made, I think that goes -- that goes to -- that's why
19 that was discussed and she brought that up, because it is
20 relevant to his testimony about his time when he did work at
21 the City, and she brought it up --

22 THE COURT: Well, I saw that as being necessary to do
23 having the bell been rung on your examination of Mr. Fitzgerald
24 and it being somewhat of a step to take to diffuse any notion
25 that he would have been terminated or had any bias based on his

1 termination. That's the way I construed it.

2 Let me just say this. I am troubled by what -- and I
3 have to be careful because we're on the record and I don't want
4 to say anything, well, at this time. I issued -- I stated the
5 reasons for the order to show cause, and so I'm going to hear
6 you at the appropriate time on that order. I'm going to
7 consider the motion to dismiss. I am also considering whether
8 a limiting instruction would cure any prejudice on the part of
9 the defendant in what could still be construed as a violation
10 of a Court order; though, once again, I'll have a fair hearing
11 on that to determine if, in fact, there was, and also whether
12 counsel overstepped by references payment of a judgment by the
13 City of Albuquerque. So that's also part of the order to show
14 cause.

15 The question is whether this case should be
16 dismissed. So for the time being I'm going to take that under
17 advisement. That's obviously a consequential step that the
18 Court would take, but before I get to that point, whether --
19 and I think it's fair that other steps be considered, including
20 a limiting instruction. So that's the way I'm going to leave
21 it for now. I'm taking it under advisement, including the
22 motion to dismiss any claim for punitive damages. So I'm not
23 prepared right now to give you a ruling, so for now we'll just
24 proceed with evidence.

25 And the next witness, is that Mr. Hernandez who will

1 take the stand?

2 MS. OLIVEROS: Yes. Yes, it is, Your Honor.

3 THE COURT: Okay.

4 MS. OLIVEROS: And I understand your ruling, Your
5 Honor, but it didn't -- I don't know if I finished my argument
6 on the admissible grounds for bias with respect to
7 Mr. Fitzgerald on the judgment and that there's not -- there's
8 not insurance here, but that the question has to do with his
9 bias for the City in his testimony, and that's a permissible
10 ground, Your Honor, to introduce even under 411 any evidence of
11 that, and there was no motion to exclude that evidence, Your
12 Honor.

13 THE COURT: No, there is no motion to exclude it, but
14 I think counsel is well aware of the spirit of the rule, and
15 that is to not introduce any evidence to the jury as to any
16 judgment or who would pay on that judgment. That would simply
17 be irrelevant, and that is at the very least one reason we have
18 the rule, is giving the jury an improper basis to render a
19 verdict. And so no, there wasn't a motion to exclude, but the
20 rules are the rules, and that at least steps -- oversteps the
21 spirit of the rule, if not the letter.

22 MS. OLIVEROS: Well, Your Honor, I do understand that
23 there are permissible grounds for this type of evidence, Your
24 Honor, and that is --

25 THE COURT: Sure.

1 MS. OLIVEROS: -- that is the grounds that I was
2 questioning Mr. Fitzgerald on, Your Honor. I request that the
3 motion to dismiss or any sanctions in that regard be denied. I
4 think a limiting instruction would cure any potential
5 prejudice. The City has -- The defense has raised from the
6 beginning of trial that my client has a prejudice against the
7 City, and so the idea that the City's involvement in the case
8 and the City is not -- you know, the City has nothing to do
9 with anything has been brought up by the defense, that my
10 client has an axe to grind, that Mr. Powdrell has an axe to
11 grind against the City. This is something that if someone
12 wanted to cover in voir dire they could have, Your Honor.

13 There's no surprises with the connection to the City.
14 I didn't mention the admissions because you excluded those, but
15 there is a whole host of other ways that Mr. Fitzgerald can and
16 is biased towards the City in his testimony. And one of
17 those -- one of those has to do with getting a resignation
18 versus being terminated. I think that's important to show his
19 bias, Your Honor. But I would like the opportunity to fully
20 brief this. And I don't have the benefit of the transcript.
21 Certainly I have the Court's orders at the forefront of my
22 mind, and there's -- there's nothing that I'm trying to do to
23 violate them. As evidence comes in, I think that it's
24 important that I be able to advocate within the bounds of the
25 rulings, Your Honor, and that's what I'm trying to do.

1 THE COURT: All right. Anything else from counsel
2 before -- I'm going to take a recess just for a moment, but
3 anything else before we recess?

4 MS. OLIVEROS: Yes, Your Honor.

5 THE COURT: Okay.

6 MS. OLIVEROS: I'm looking at the defendant's
7 supplemental trial exhibit list, and just because I think this
8 will come up in cross --

9 THE COURT: Okay.

10 MS. OLIVEROS: -- this is document 273, and I don't
11 think there's been another filing since this one.

12 MS. MARTINEZ: There's the one I did earlier, on the
13 first day of trial.

14 MS. OLIVEROS: 5/28? On 5/28?

15 THE COURT: Okay. I have 273, defendant's
16 supplemental trial exhibit list. Is that --

17 MS. MARTINEZ: That's the last one, yes, Your Honor.

18 THE COURT: Okay.

19 MS. OLIVEROS: Okay. And, Your Honor, on this
20 exhibit list, there are -- there are sort of some broad
21 categories of exhibits, and I believe these -- at least a fair
22 portion of the responses, for example, in Defendant's B,
23 plaintiff's discovery responses and supplemental responses, the
24 Court in the pretrial conference and in your order 250- -- I
25 want to say it's 252, there was a lot of discussion about

1 certain discovery responses that may contain 404(b) and other
2 arrests that the Court in 110, 111, and I want to say 252 said
3 that they would not come in as a part of the sanction and that
4 the Court did an analysis on 404(b) and 403 and excluded
5 specifically, for example, the substance of the responses to
6 Interrogatory Number 16, and so I don't know what exactly the
7 defendant wants to introduce, but I believe that -- and I
8 thought that at the pretrial conference they said that they
9 were going to withdraw a fair portion of these references which
10 would in B.

11 The prior lawsuits against the City of Albuquerque, I
12 understand that those -- there can be questions about them, but
13 it would be cumulative for them to come in as substantively.
14 And E, all -- we don't have objection to A or D, Your Honor,
15 but Exhibit E, all documents listed as exhibits in document 95,
16 I think we've gone over this kind of at length in these orders,
17 and I'm looking at 252, and I thought that the defense was
18 going to pull most of those exhibits, which include incident
19 reports and arrest records, MDC records, and arrest records
20 with specific incidents. Those are all hearsay, and I believe
21 those are excluded, and the Court ordered that Mr. Hernandez
22 could be questioned about his response to number 20, but that
23 these -- this extrinsic evidence wouldn't come in.

24 And then Exhibit H, Mr. Herrick's deposition,
25 Mr. Herrick isn't available within the meaning of the rule for

1 depositions, Your Honor, and his deposition is going to be
2 either played or read, I understand from the defense. And it's
3 not proper to have it as an exhibit for the jury to look at.
4 It's -- It is in lieu of live testimony and it's -- and it,
5 just like everybody else, the way that works I think it should
6 be just played and then that's it.

7 THE COURT: I think that's a worthy point.

8 Ms. Martinez.

9 MS. MARTINEZ: Your Honor, I'm aware of all the
10 Court's rulings. I didn't withdraw my exhibits. The Court's
11 already ruled, and I'm going to comply with the Court's orders
12 in this regard. And I think --

13 And just to alert the Court, the Court doesn't want
14 the interrogatories in as substantive exhibits, but what I plan
15 to do is just go over the plaintiff's failures to respond to
16 the discovery appropriately and the sanctions that were issued
17 and not get into the substance of the responses even with
18 regard to 20, because I think it just gets sort of confusing.

19 THE COURT: Okay.

20 MS. MARTINEZ: But I will -- I'm aware of the Court's
21 orders, and I'm going to abide by the Court's orders with
22 regard to all those exhibits, Your Honor.

23 THE COURT: Okay. So, now, Mr. Herrick's deposition,
24 is that video that you'll play or is it going to be read? How
25 are you --

1 MS. MARTINEZ: It's video that I'll play, Your Honor,
2 and I already have the clips of the defendant's designated
3 portions of the two, so they're ready to go.

4 THE COURT: Okay.

5 MS. MARTINEZ: And then the last thing, Your Honor,
6 is last night you ordered us to go back and scour our records
7 to determine whether there had been any supplementation of the
8 plaintiff's discovery responses. I did that. I also checked
9 to determine whether the plaintiff provided the defendants with
10 any initial disclosures or supplemental disclosures. I
11 couldn't find any.

12 THE COURT: This is relating to Ms. Aguilera and
13 Mr. Padilla?

14 MS. MARTINEZ: Correct. Yes. And so I have for the
15 Court copies of the relevant interrogatories. And so it was
16 Interrogatory Number 2 that asked for any relevant witnesses.
17 That interrogatory was never supplement and those two witnesses
18 are not listed.

19 Then I did ask Mr. Hernandez with whom he
20 communicated about the litigation. Those two individuals did
21 come up in response to that interrogatory, but he -- in
22 response, that was Interrogatory Number 11 -- or 9, and he also
23 provided a supplemental answer, but he never provided contact
24 information or the substance of their communications.

25 And then I did question him about it at his

1 deposition, and we only discussed it looks like Mr. Padilla,
2 and I asked him what information Mr. Padilla would have, and
3 his testimony was "We've just been friends through a mutual
4 friend." "What did you tell him about this litigation?" "I
5 don't remember our exact communication, but most likely
6 basically what happened." And then he indicated they hadn't
7 spoken in years.

8 So his -- the substance of his purported testimony
9 was never disclosed, his contact information was never
10 disclosed, and it's the same for the other witness, Your Honor.
11 And I do have those documents if the Court would like them for
12 the record.

13 THE COURT: Okay. So, sure, I'll take those up.

14 Let me just, since it's been brought up, my prior
15 ruling on document 222, this was the plaintiff's motion
16 in limine, and that was an order -- an oral order that I
17 entered at the pretrial conference that was on May 9th, 2019,
18 so the excluded information and topics are plaintiff's alleged
19 delinquent child support payments. This is all within that
20 original motion in limine, document 222, plaintiff's alleged
21 delinquent child support payments and his status as what would
22 have been characterized allegedly as a bad father; plaintiff's
23 criminal history, including arrests and convictions other than
24 those that I've already described and will describe again just
25 in a moment, and the nature and substance of Interrogatory

1 Number 16 relating to Judge Yarbrough's sanctions that he
2 imposed.

3 Now, what I am allowing is that the defendant may
4 question plaintiff regarding his failure to answer multiple
5 interrogatories more than once, even when plaintiff was ordered
6 by this Court to provide true and complete answers,
7 Interrogatory Number 20; meaning that defendant may ask
8 plaintiff about what specially or specifically Interrogatory
9 Number 20 asked, plaintiff's multiple answers to Interrogatory
10 Number 20, and the substance of plaintiff's specific contacts
11 with law enforcement officers, including arrests that resulted
12 in the prior lawsuits. And it's my understanding there's one
13 prior to this one that resulted in a settlement. And any other
14 complaints against the Albuquerque Police Department or the
15 City of Albuquerque as well as any claims plaintiff has made
16 prior to his lawsuit or in his prior lawsuit, including any
17 claimed injuries, and the fact that the prior lawsuit was
18 settled. So I am allowing questioning on those -- on those
19 matters.

20 Any questions about the scope?

21 MS. MARTINEZ: I have a couple -- Well, I planned on
22 raising the fact that the plaintiff doesn't pay -- hasn't paid
23 income taxes or filed tax returns, Your Honor. There's no
24 order on that issue. So I just wanted to alert the Court of my
25 intent in that regard. And then the plaintiff testified that

1 he's also been in multiple other altercations with homeless
2 individuals that he's either been the victim of or that he's
3 initiated, and I also plan on cross-examining him on those
4 issues as well. So I just don't want to run afoul of any of
5 the Court's orders, and I wanted to alert the Court of my
6 intention in that regard.

7 THE COURT: Okay. Did those other altercations
8 result in a lawsuit against the City?

9 MS. MARTINEZ: They did not result in lawsuits
10 against the City, Your Honor. It goes to demonstrate the
11 plaintiff's understanding of battery, of false imprisonment.
12 And his testimony with regard to those incidents is that he
13 took these people down to the ground but allowed them to fall
14 on top of him. So it also goes to his claim of alleged
15 injuries, Your Honor. So it goes to both his credibility and
16 damages.

17 THE COURT: Okay. Ms. Oliveros, as to any of that
18 proposed line of questioning?

19 MS. OLIVEROS: Yes. Well, Your Honor, with respect
20 to the income taxes, that's not relevant to any claim or any
21 defense, Your Honor. He doesn't have an economic damages
22 claim, and that's simply, I believe, meant to assail his
23 character and would be impermissible and irrelevant and more
24 prejudicial than probative under Rule 403 of balancing, Your
25 Honor.

1 With respect to multiple altercations, I don't know
2 exactly what she is referring to, Your Honor, but that didn't
3 result in a false -- a battery. That's 404(b) character
4 evidence, I believe, to show that he was acting in a certain
5 way and would have been acting in a similar fashion on this
6 occasion, and I think it's impermissible on those grounds. I
7 don't understand how this would go to his credibility in this
8 case. I don't believe that's an appropriate ground for --

9 THE COURT: So if I excluded it under 404(b),
10 agreeing with you that it wouldn't be a proper purpose under
11 that rule, though the door is a little bit wider in what the
12 Court would allow for impeachment purposes even if it's not
13 under Rule 404(b), so including motive, which goes to
14 credibility, and if Mr. Hernandez is on the stand, the idea is
15 that credibility is always an issue when the witness is on the
16 stand, what would you say about that?

17 MS. OLIVEROS: Well, I'm not clear on exactly what
18 the defense is going to bring out and what -- and, you know,
19 how that can be relevant to his credibility at this point, but
20 I agree with the Court, that credibility is always an issue,
21 and someone's motive to testify a certain way or any biases
22 that they have is something that can be explored to the extent
23 that it doesn't infringe upon the factors that we have to
24 consider under 403, Your Honor.

25 So I'm not -- Like I said, by the statement of the

1 defense, I'm not sure how the other incidents weigh on his
2 credibility, and that's not clear to me.

3 THE COURT: Okay. Would you clarify that,
4 Ms. Martinez.

5 MS. MARTINEZ: Yes, Your Honor. So with regard to
6 the taxes, on the audio recording that we've heard,
7 Mr. Hernandez's cell phone video, he repeatedly, he says,
8 "You're violating the law. You're violating the law. This is
9 an illegal arrest," and yet, you know, he doesn't pay his own
10 taxes, which he acknowledges if he owed them would be a
11 violation of the law.

12 So his understanding of the law -- And it also goes
13 to his credibility, Your Honor. It's every person's obligation
14 to pay their taxes. And he's owned his own business, his
15 testimony is, since he got out of high school, and all these
16 years, it's been since the '80s since he's paid taxes, and that
17 goes to his credibility, Your Honor.

18 THE COURT: Let me just -- I'll just rule on that.
19 And I understand what the purpose would be in the line of
20 questioning regarding income taxes or failure to pay income
21 taxes, that where it could relate to credibility or
22 law-abidedness, to put it that way, and in that way relevant
23 under 401, I will find that under 403 that the danger of unfair
24 prejudice would outweigh the probative value of the evidence
25 relating to nonpayment of income taxes. Okay. So that's my

1 ruling as to income taxes.

2 Though, as to the other altercations.

3 MS. MARTINEZ: Okay. As to the altercations, Your
4 Honor, it's plaintiff's claim that he was -- excessive force
5 was used against him, that he was assaulted and battered by the
6 defendants -- or by my client, and that he was falsely
7 imprisoned. Yet he engaged in the very same conduct with
8 regard to homeless individuals. And it's conduct that he finds
9 just appropriate. His testimony was these people were out of
10 control, he was just trying to subdue them, he just held on to
11 them until they were able to control themselves and then he let
12 them go. And so, you know, it's a double standard for
13 Mr. Hernandez. When he does it, it's fine. When other people
14 do it, it's a civil rights lawsuit.

15 In addition, there was another individual that
16 punched him in the face that he caught selling drugs in a
17 bathroom. This individual punched him in the face. And I
18 asked Mr. Hernandez whether he brought a lawsuit against this
19 individual for punching him in the face, and his testimony was
20 no, he didn't.

21 THE COURT: Okay. So as to that particular line of
22 questioning, and I would construe it was being consistent with
23 what I've already ruled on and the substance of plaintiff's
24 specific contacts with law enforcement, I will allow that line
25 of questioning for any impeachment type of purposes. Once

1 again, credibility being of central importance in any witness's
2 testimony. And this would go, as I'm construing it, as,
3 arguably -- I'm not finding it, Mr. Hernandez, but what could
4 be argued to be a motive to fabricate or as to any bias that
5 Mr. Hernandez may have against the City. Once again, I'm not
6 making that finding, Mr. Hernandez, but in fairness both to you
7 and to the defendant I'm allowing that line of questioning.
8 Okay. So that's my ruling as to that.

9 Once again, I'm just seeing that as being consistent
10 with what I've already ordered to be allowed, and that would
11 have been issues that were raised in the motion in limine
12 document 222.

13 Okay. So that's my ruling as to those motions. I
14 guess in that way they were renewed motions.

15 Okay. I'm going to take a very brief recess, though,
16 give the jury a chance to line up, though, Ms. Oliveros are you
17 going to stand?

18 MS. OLIVEROS: Yes, Your Honor. I want to just -- We
19 argue -- We argued, I believe, before against the admission of
20 these incidents. I think they are mini trials. I think that
21 it's very different what the standards that apply to law
22 enforcement or transit officers or folks imbued with the power
23 of the Government and the power to arrest and detain and use
24 force against other -- against folks, it's very different with
25 respect to an average citizen. I think that that is irrelevant

1 and that it's 404(b) and also violates 403, Your Honor, and I
2 believe we preserved that, but just for the record I want to
3 make sure that I'm preserving that as well.

4 THE COURT: Okay. Just to clarify, I'm not allowing
5 it under 404(b), so I'm agreeing with you in that regard. This
6 being an area for potential impeachment. Nothing's been
7 established, but in an attempt to impeach, that's a wider
8 margin, and so in that way I'll allow it.

9 Okay. So we'll be in recess. We'll give the jury a
10 chance to line up.

11 (Court stood in recess at 9:01 a.m. and resumed at
12 9:06 a.m.)

13 * * * * *

14 MS. OLIVEROS: I don't know if you are or you're not,
15 Your Honor. I know that the defense has proffered an
16 instruction based on, I believe, the supplemental instruction
17 based on the issue of the disciplinary actions.

18 THE COURT: Yes.

19 MS. OLIVEROS: And so if that's the case, then that's
20 going to come in, then we would need this instruction, Your
21 Honor.

22 THE COURT: Okay. So let's just put our thumb on
23 Number 14 for the time being. Let's go back and deal with that
24 one.

25 So I have tendered in document 275, this was

1 defendant's proposed limiting instruction concerning
2 plaintiff's reference to documents in personnel file. So the
3 language that Ms. Martinez proposes is, as a limiting
4 instruction, "Evidence and testimony concerning any discipline
5 or the termination of Andy Fitzgerald and/or any allegations
6 that he used excessive force or detained other individuals
7 during his employment with the City of Albuquerque cannot be
8 considered in establishing the plaintiff's claims against him."

9 So, all right. Your position as to that limiting
10 instruction, Ms. Oliveros? Do you have a copy, by the way?

11 MS. OLIVEROS: I do, Your Honor. I had misplaced it
12 for a second.

13 THE COURT: Okay.

14 MS. OLIVEROS: No, Your Honor, I don't -- I don't
15 have an objection to this instruction.

16 THE COURT: Okay. So what I'm considering, is this
17 kind of goes to that instruction on excessive force, so what I
18 would do is include this as Instruction -- that's Number 7,
19 excessive force, so this particular limiting instruction would
20 be Instruction 7A, kind of logically follows. So there's no
21 objection. It will be utilized. It will be inserted as 7A.

22 MS. MARTINEZ: Your Honor, I think it actually goes
23 to 7 and 8, because it's also regarding detention, so could I
24 request it be 8A as opposed to 7? Or, actually, Your Honor,
25 7A's fine. I withdraw that. Never mind.

1 THE COURT: Okay.

2 MS. OLIVEROS: Your Honor, I think -- I apologize.
3 I think -- I think this instruction has to say -- it has to say
4 "other than any allegation that he used excessive force
5 excluding the present allegations in this case." And I -- I
6 didn't catch that before.

7 THE COURT: Okay. What are you proposing, then? Let
8 me just --

9 I know I'm keeping folks late in the courthouse
10 because I'm still in session, so I appreciate the time. So,
11 anyway, I just wanted to mention that.

12 MS. OLIVEROS: So I think it should say "and/or" on
13 the second line, "and/or any allegations that he used excessive
14 force or detained other individuals during his employment with
15 the City of Albuquerque not" -- Let's see.

16 MS. MARTINEZ: Your Honor, what if it says "and/or
17 any previous allegations" on the second line? And I think that
18 would cure counsel's concerns about . . .

19 MS. OLIVEROS: Or, because it was -- the timing was
20 different when we mentioned some timing was after, in December
21 of 2012, although I don't know that that would cure it.

22 THE COURT: That would be previous allegations.

23 MS. OLIVEROS: I think that would be post, Your
24 Honor, December after the August incident.

25 THE COURT: Oh, of 2000- -- sure.

1 MS. MARTINEZ: How about "any other allegations"?
2 Does that work?

3 MS. OLIVEROS: I would say "any allegations other
4 than the allegations in this case."

5 MS. MARTINEZ: I think that's confusing.

6 THE COURT: I tend to agree. I would accept the
7 "any" -- I think it's a legitimate point, Ms. Oliveros, to
8 bring up to qualify this somehow, so I think to do that we'll
9 insert the language "and/or" -- Well, excuse me. We'll insert
10 the word "other" after "and/or any" to be clear that we're not
11 talking about what is alleged in this particular case.

12 MS. OLIVEROS: "And/or any." So just the word
13 "other" after "any," Your Honor?

14 THE COURT: Correct. All right. So that would be --
15 Let's go back to Number 14, then. So again, there was what I
16 thought was a stipulated instruction, which is Number 14. Any
17 objection now as to 14?

18 MS. MARTINEZ: No, Your Honor.

19 MS. OLIVEROS: No, Your Honor.

20 THE COURT: I'm going back probably to Number 8.

21 Okay. Can I draw your attention back to Number 8?
22 All right. There's no objection to what you currently have.
23 So the instruction refers to arrest, and so what I'm
24 considering is instead of using the word "arrest," adding the
25 word "seizure" or utilizing the word "seizure" or redacting out

1 the word "arrest" where it's currently being used.

2 So let me give you a moment to look that over.

3 And as you're doing that, let me also tell you what
4 I'm considering doing, which is striking what is currently the
5 second paragraph that addresses a warrantless arrest, such as
6 the one involved in this case, so that entire paragraph would
7 be struck.

8 MS. OLIVEROS: The entire paragraph, Your Honor?

9 THE COURT: Yeah. So we're not -- I guess the
10 thinking here is we're really not -- there was no evidence
11 about warrantless seizures. I understand what the claim is,
12 but to the extent that what we're talking about is the absence
13 of a warrant or whether a warrant was necessary, there was no
14 evidence to that effect in this particular case.

15 So the seizure here, I guess that -- whether there
16 was a seizure would be up to the jury to decide. Whether they
17 have to go all the way to find that there was an arrest, I'm
18 not so sure that was necessary given what the claim is, and
19 that's why I'm considering just redacting out that particular
20 paragraph.

21 So that would be a substantial change to what we
22 currently have in Number 8.

23 MS. OLIVEROS: Your Honor, my -- and I might need to
24 relook at that, if I may. It does talk about probable cause
25 down at the final paragraph, and so I agree that a seizure -- I

1 agree that the focus should be on the seizure, and I just want
2 to make sure that we have the law related to seizures that will
3 help the jury decide on this issue.

4 THE COURT: A specific instruction relating to
5 seizure?

6 MS. OLIVEROS: Yes, because we have --

7 THE COURT: Okay. So then what I would propose, in
8 addition to striking the language that would be in the
9 paragraph beginning "a warrantless arrest," would be to explain
10 and instruct the jury that a seizure -- words to the effect "a
11 seizure occurs when a reasonable person would believe based on
12 a transit officer's use of physical force or show of official
13 authority that he or she is not free to leave, terminate the
14 encounter, go about his or her business, or otherwise ignore
15 the transit officer's presence," and would add the language at
16 the --

17 Let's go ahead and prepare a draft. Do you have it?
18 Okay. It may be easier for the attorneys to look at what we
19 actually have.

20 MS. OLIVEROS: And, Your Honor, plaintiff filed a
21 Supplemental Request Number 1, document 174, also along these
22 lines. Let's see.

23 MS. MARTINEZ: Your Honor, I would just like -- so
24 the final -- the fourth paragraph there -- that's there, I
25 would just like to do a little bit more research on the seizure

1 issue, because -- and, you know, submit a version for the
2 defendants with this material change, because -- I agree with
3 the Court's language.

4 THE COURT: You mean the bolded language?

5 MS. MARTINEZ: Actually, I do agree with the Court's
6 language now that I review the bolded language again, so I'm --
7 I withdraw. I agree to the Court's language in Jury
8 Instruction No. 8.

9 THE COURT: So it does define to some extent
10 seizure --

11 MS. OLIVEROS: And, Your Honor, I agree with the
12 definition of seizure here, but I think that -- I think we
13 should also have what -- the language with some modification
14 that Plaintiff's Supplemental Jury -- Requested Jury
15 Instruction No. 1 adds document 274, but we would -- I would
16 suggest that instead of saying "arrest" we would just say
17 "seized" and take out the -- and take out "arrest." Take
18 out -- I don't know if you have it there in front of you, Your
19 Honor.

20 THE COURT: I have document 274, but just sticking
21 with Number 8 for the moment as it's modified, and I think you
22 have a copy of the modification which includes added language
23 and also is what is indicated there as a redacted language,
24 would you have any objection to that modification?

25 MS. OLIVEROS: I don't, Your Honor. I think it's

1 incomplete, but I don't have an objection to the language that
2 is the proposed modification.

3 THE COURT: Okay. All right. So Number 8 as
4 modified would be used.

5 I sort of jumped back from Number 14. And I'll get
6 to Number 274 -- Document 274, but first let's get through the
7 remainder of the instructions that I have here.

8 Okay, there was no objection to 14.

9 As to 15? I also have that as stipulated.

10 MS. MARTINEZ: That's correct, Your Honor, no
11 objection.

12 THE COURT: Okay.

13 MS. OLIVEROS: I'm sorry, Your Honor, I just lost my
14 place.

15 THE COURT: Sure.

16 MS. OLIVEROS: No objection, Your Honor.

17 THE COURT: All right. 16, I also have that as
18 stipulated.

19 MS. MARTINEZ: No objection, Your Honor.

20 MS. OLIVEROS: No objection, Your Honor.

21 THE COURT: Number 17?

22 MS. MARTINEZ: No objection, Your Honor.

23 MS. OLIVEROS: No objection, Your Honor.

24 THE COURT: Number 18?

25 MS. MARTINEZ: No objection, Your Honor.

1 MS. OLIVEROS: No objection.

2 THE COURT: All right. 19?

3 MS. MARTINEZ: No objection, Your Honor.

4 MS. OLIVEROS: No objection, Your Honor.

5 THE COURT: Number 20?

6 MS. MARTINEZ: No objection, Your Honor.

7 MS. OLIVEROS: No objection, Your Honor.

8 THE COURT: All right. 21, I also have that as
9 stipulated.

10 MS. MARTINEZ: No objection, Your Honor.

11 MS. OLIVEROS: It's stipulated.

12 THE COURT: Yes. Okay. Number 22?

13 MS. MARTINEZ: There's no evidence on Number 2, Your
14 Honor. There's no evidence on Number 5.

15 THE COURT: Okay. Taking Number 5 first, let me just
16 read that. So the language is "The reasonable" -- these are
17 the elements.

18 MS. OLIVEROS: Your Honor, there is no -- there's no
19 testimony on Number 5.

20 THE COURT: So you'd agree that would be redacted
21 out?

22 MS. OLIVEROS: Yes.

23 THE COURT: Okay. So the language "The reasonable
24 expense of necessary medical care, treatment and services
25 received, and the present cash value of the reasonable expenses

1 of medical care, treatment, and services reasonably certain to
2 be received in the future" is struck. There's no evidence as
3 to that.

4 Okay. Ms. Martinez, you mentioned Number 2 also.

5 MS. MARTINEZ: Based on the plaintiff's testimony of
6 not having proof of any injuries, the nature, extent, and
7 duration, there was very scant evidence that he had a hard time
8 swallowing for a month and a half. That was the testimony,
9 with no medical evidence at all.

10 THE COURT: All right. Ms. Oliveros?

11 MS. OLIVEROS: Your Honor, the testimony that I have
12 in my mind about what Mr. Hernandez testified about is that
13 there was certainly testimony to establish this element and
14 that the jury should decide it. He talked about when -- He
15 talked about the fact that he didn't have proof. He did
16 qualify that, and he was talking about his shoulder injury, and
17 then I believe he talked about the nature, extent, and duration
18 of his throat injury, and we don't have to have medical
19 testimony. The testimony that he gave had a temporal proximity
20 to the harm and was within that time frame, and he testified
21 about it, and he showed some photographs that corroborate his
22 testimony, and the mechanism of injury also corroborates his
23 testimony, Your Honor. He talked about his shoulders and his
24 elbows having been injured at the bus stop by Fitz- -- And I
25 want to be clear on this. He put both officers behind him for

1 his shoulders, including Fitzgerald, and he specifically
2 identified Fitzgerald coming at him with his throat and choking
3 him, which left marks and gave him pain and also emotional
4 injuries and anxiety. And so there is testimony on all of. On
5 Number 2, we have sufficient testimony for --

6 THE COURT: Well, I understand it's disputed what it
7 all -- how the jury would accept it. I think it would be up to
8 them. The testimony also included Mr. Hernandez explaining the
9 effect that the injury had on his tendons, his ligaments.
10 There is no medical testimony, but there is that testimony,
11 including difficulty carrying suitcases, I think he said, when
12 he was on vacation. That was some period after the event.

13 So I'll find that there is at least the minimal
14 amount of evidence that's in the record to support the giving
15 of the Jury Instruction No. 22 and the second element as to the
16 nature, extent, and duration of the injury.

17 Okay. As to the remaining portion of that
18 instruction?

19 MS. MARTINEZ: No objection, Your Honor.

20 THE COURT: Okay. For plaintiff?

21 MS. OLIVEROS: No objection, Your Honor.

22 THE COURT: Okay. Number 23?

23 MS. MARTINEZ: No objection, Your Honor.

24 MS. OLIVEROS: No objection, Your Honor.

25 THE COURT: Okay. Number 24?

1 MS. MARTINEZ: No objection.

2 MS. OLIVEROS: No objection.

3 THE COURT: 25?

4 MS. MARTINEZ: No objection, Your Honor.

5 THE COURT: I have a note here that it's stipulated,
6 but for the plaintiff?

7 MS. OLIVEROS: Well, Your Honor, there wasn't any --
8 I don't believe there was any testimony that plaintiff
9 didn't -- that plaintiff did -- I think that it was stipulated
10 to in error, but the testimony that we heard is that he
11 didn't -- he didn't claim that his injuries extended for a
12 period -- an extended period of time, and so I don't think a
13 mitigation instruction is appropriate under his testimony.

14 THE COURT: All right. With the mitigation, how
15 would this instruction apply here?

16 MS. MARTINEZ: Well, to the extent that he is going
17 to claim that he has continuing issues. He never sought
18 treatment for them, so . . .

19 THE COURT: Okay. I think that's fine. So I
20 understand the objection. So Number 25 will be given as
21 currently drafted.

22 Okay. Number 26?

23 MS. MARTINEZ: So this is the instruction that was
24 part of my motion earlier today, Your Honor, so I renew that
25 motion.

1 THE COURT: Requesting the Court dismiss the claim
2 relating to punitive damages as a sanction for a violation of
3 the Court order?

4 MS. MARTINEZ: For both a violation of the Court
5 order and the Federal Rules of Evidence, yes.

6 THE COURT: All right. Ms. Oliveros?

7 MS. OLIVEROS: Your Honor, I think that it's -- One,
8 I haven't had the full opportunity, although I have obviously
9 responded to the Court's -- you know, the Court's concerns and
10 findings of the violation of your orders, Your Honor. I, one,
11 I would like a full opportunity to explain exactly what
12 transpired and why I don't believe there has been a violation
13 of the Federal Rules of -- I don't know if it's Civil Procedure
14 that she's referring to. If there is a sanction against me,
15 Your Honor, for the way that I -- the way that I interpreted
16 the order and the way that I proceeded with evidence, I believe
17 that that can be cured, and I also believe that my client
18 should not be sanctioned personally with respect to evidence in
19 this case.

20 We have evidence of punitive damages. We have
21 evidence that Mr. Hernandez was choked by Mr. Fitzgerald while
22 he was in handcuffs, and that he was -- forcibly had his phone
23 taken from him, and that he was thrown down by Mr. Fitzgerald
24 and Mr. Powdrell without any -- without any lawful reason to
25 take his phone.

1 And those facts are -- Those facts are -- should have
2 no bearing on the sanction that the Court is contemplating for
3 my client. That would be -- That -- I don't believe that's an
4 appropriate sanction, Your Honor. And there hasn't been a
5 pattern of conduct on behalf of the plaintiff for him to be
6 sanctioned in his case and evidence that has come before the
7 Court, Your Honor.

8 If the Court wants to sanction me, and that's what I
9 understood that the Court might do, I would like, again, full
10 opportunity to explain my conduct and that I should be the one
11 that would be sanctioned. I don't believe that there is the
12 case law -- And I haven't had a chance to fully research this,
13 but dismissals and sanctions with the lawsuit are extremely
14 rare and considered to be highly -- I believe that they're only
15 granted under extraordinary circumstances, Your Honor, and,
16 like I said, I haven't had a chance to put everything on the
17 record that I would like to, and I think there are some things
18 that the Court may not be aware of in terms of discovery that
19 was provided, like I said, over the weekend with respect to
20 Mr. Fitzgerald and other testimony that we had in his
21 deposition that had -- came into play.

22 THE COURT: Well, let me just explain. And I
23 understand all of that. There is an outstanding order to show
24 cause. Part of what the Court was considering was the motion,
25 at least in part, for sanction to dismiss the claim for

1 punitive damages. I'm going to deny that motion. I am taking
2 under advisement, though, whether or to what extent counsel is
3 or should be sanctioned. But that's a question that I'm not
4 going to rule on at this time except insofar as denying the
5 motion to dismiss the punitive damages case.

6 I would agree, there is evidence in the record the
7 jury would consider and there at least is enough, minimally
8 enough to warrant an instruction for punitive damages. So just
9 noting what Ms. Oliveros has explained about the conduct -- the
10 alleged conduct of the transit officers, what is depicted on
11 the video. So in that respect I'm denying that part of the
12 motion. The sanction -- Or, excuse me. The punitive damages
13 instruction will remain.

14 All right. So that's Number 26.

15 All right. As to Number 27?

16 MS. MARTINEZ: No objection, Your Honor.

17 MS. OLIVEROS: No objection, Your Honor.

18 THE COURT: Okay. Number 28?

19 MS. MARTINEZ: No objection.

20 MS. OLIVEROS: No objection, Your Honor.

21 THE COURT: 29?

22 MS. MARTINEZ: No objection, Your Honor.

23 MS. OLIVEROS: No objection, Your Honor.

24 THE COURT: And 30?

25 MS. MARTINEZ: No objection.

1 MS. OLIVEROS: No objection, Your Honor.

2 THE COURT: All right. So getting back to what is
3 filed, document 274, Ms. Martinez, do you have a copy of this?

4 MS. MARTINEZ: I do, Your Honor.

5 THE COURT: Okay. All right. So, Ms. Oliveros, I'll
6 hear you on this. This is your supplemental requested jury
7 instruction.

8 MS. OLIVEROS: Yes, Your Honor. After the testimony
9 that -- May I -- Shall I sit, Your Honor, or --

10 THE COURT: You can remain sitting. That's fine.

11 MS. OLIVEROS: Okay. After the testimony yesterday,
12 like I said, the concern was that -- of the confusion with
13 transit officer's authority and arrest, and I believe we needed
14 an instruction on seizure, and so we -- the Supplemental
15 Instruction No. 1 I believe -- And also Mr. Fitzgerald talked
16 about probable cause, and I don't know -- I thought -- I think
17 that that's kind of -- He did -- He did seize -- I mean, we're
18 alleging he did seize my client without probable cause. I
19 think that this instruction could be helpful, but after
20 considering the arguments today, I would suggest that we modify
21 it so that it would say "The defendant unlawfully seized him
22 without probable cause that he had committed a crime" and then
23 change this to seizures without probable cause violate a
24 person's clearly established Fourth Amendment rights, and
25 change the "arrest" to "seizures."

1 I think this is important to have, because they don't
2 have the framework to understand the -- you know, the nuances
3 of what -- you know, what an officer can do to seize someone
4 and also to handcuff them and detain them, and so I think that
5 we do need the additional law on probable cause as well,
6 because otherwise there's no explanation of what would be --
7 what would be the right to seize someone.

8 THE COURT: Okay. Although we did have the language
9 in what is now Number 8 that defines a seizure, which occurs
10 when a reasonable person would believe based on the transit
11 officer's use of physical force or show of official authority
12 that he or she is not free to leave, terminate the encounter,
13 go about his or her business, or otherwise ignore the transit
14 officer's presence. I'm just noting now what is in the
15 instructions.

16 Ms. Martinez.

17 MS. OLIVEROS: And if I -- May I -- Your Honor, that
18 is the part once you're seized, and so I think we need the part
19 about the authority to seize, and that is the distinction that
20 I'm drawing, once you are seized, to explain that -- really
21 explain the consent issue, and those are the differences in the
22 two perspectives, Your Honor, and I think they both have to be
23 covered.

24 THE COURT: Okay, Ms. Martinez.

25 MS. MARTINEZ: Your Honor, I think that the Court's

1 Number 8 correctly removed the language from probable cause.
2 The testimony throughout has been that the officers don't have
3 legal authority to arrest. That's what's required by APD, so
4 the Court's correct in terms of the facts. And the Court's 8
5 incorporates the language in counsel's Instruction No. 3 in
6 document 274. But I think the Court's Instruction 8 does
7 what's required based on the facts of this case and the
8 applicable law.

9 THE COURT: Okay. So as to the motion, what I'm
10 construing as a motion to include what is currently Proposed
11 Plaintiff's Supplemental Requested Jury Instruction No. 1, this
12 is in document 274, so I'm denying that motion given what we
13 currently have in Number 8. So the seizure, the standard for
14 seizure and the standard for an arrest are two wholly different
15 standards. I don't see that we have evidence as to an arrest.
16 Certainly there has been evidence relating to a seizure.
17 Probable cause being required for an arrest. The evidence in
18 the case does not include an arrest in this case. So that
19 motion is denied.

20 Now, as to Proposed or Requested Supplemental
21 Instruction No. 2, that's, I would say, the same ruling, but
22 any other thoughts on this, Ms. Martinez?

23 MS. MARTINEZ: No, Your Honor. For the same reasons
24 as I articulated in writing.

25 THE COURT: Sure. And as to Number 3, same position?

1 MS. MARTINEZ: Same position, and I believe your
2 Number 8 incorporates that language, Your Honor.

3 THE COURT: Okay. I see that. All right.

4 Ms. Oliveros, so I'm denying the motion to include
5 those supplemental instructions. I'm noting your objection, of
6 course, that you would want those included.

7 All right. Anything else, any other instructions to
8 discuss?

9 MS. MARTINEZ: Just with regard to the Special
10 Verdict Form, Your Honor.

11 THE COURT: Okay.

12 MS. MARTINEZ: It looks like there's a typo in Number
13 4, Andy Fitzgerald's conduct caused plaintiff's actual injury.
14 So it's just missing a "D."

15 THE COURT: Sure.

16 MS. MARTINEZ: Number 6, unlawful seizure. It says
17 "Do you find Andy Fitzgerald's seizure of Alfonso Hernandez was
18 reasonable under the circumstances?" That presumes that he was
19 seized by my client, and I think there's a factual dispute
20 about whether he was seized by Powdrell and taken into custody
21 by Powdrell or taken into custody and assisted by my client.
22 So I think that that's a fact that the Court -- that the jury
23 needs to determine. So I just ask that 6 be, "Did Andy
24 Fitzgerald seize plaintiff Alfonso Hernandez?" and then make
25 the 6 Number 7. "Was it reasonable under the circumstances?"

1 And then I renew my objection to the punitive
2 damages.

3 THE COURT: Yes, ma'am. Okay.

4 MS. MARTINEZ: And that's it.

5 THE COURT: All right. I also note what you might
6 have as Number 10, and there's just another typo there. You
7 have now completed the special verdict. So that would
8 obviously be corrected.

9 All right. And your position on this verdict form
10 for plaintiff?

11 MS. OLIVEROS: I'm sorry, Your Honor. I think I was
12 looking at the -- Well, Your Honor, with respect to the
13 argument of Ms. Martinez, there's just -- there's -- the
14 testimony is that Andy Fitzgerald did seize plaintiff and that
15 the only -- the only issue -- the only dispute on that is just
16 that sometimes also Officer Powdrell was there with him. So
17 there was -- I don't think that this is improper in any way.

18 THE COURT: Well, as to the seizure, I understand
19 there may be a question as to when the seizure occurred.

20 Is there -- Ms. Martinez, is there a dispute that he
21 was seized?

22 MS. MARTINEZ: I don't think there's -- So under
23 1983, my client's only responsible for the conduct that he did,
24 that he engaged in, and so if he's not the one that -- that
25 they're not his cuffs, he didn't place them on, and so he's not

1 the one that seized him, he can't be responsible or held liable
2 for the conduct of Mr. Powdrell, and so that's my concern with
3 the way it's written. It invades the province of the jury and
4 assumes that they would find that Fitzgerald did, in fact,
5 seize Mr. Hernandez. I don't dispute that he was seized, but
6 there's a question as to who seized him.

7 THE COURT: Okay. Would it fair, then, if there is a
8 stipulation that he was seized? I understand the dispute as to
9 who seized him or even maybe at what kind of point he was
10 seized, but it seems the evidence has been established that he
11 was, in fact, seized.

12 MS. MARTINEZ: Correct, Your Honor, but the jury has
13 to determine who seized him, and I think the way it's written
14 it invades -- So, you know, my request would simply be, was he
15 seized by Mr. Fitzgerald? If the answer's yes, then proceed
16 on.

17 THE COURT: Okay. As to that modification,
18 Ms. Oliveros?

19 MS. OLIVEROS: I object, Your Honor. I think that
20 there's -- there's no evidence that he wasn't seized by
21 plaintiff -- by Andy Fitzgerald. It's -- Andy Fitzgerald even
22 testified that he seized plaintiff and he assisted in the
23 handcuffing, and there's no question of that. So I think it
24 would be improper for it to be worded any other way.

25 THE COURT: Well, okay. So I'm agreeing it's a

1 factual issue for the jury as to whether he was seized. I
2 understand the question as to who seized Mr. Hernandez. I
3 can't tell any party to stipulate, so there being no
4 stipulation, then the question will go to the jury as to
5 whether Mr. Hernandez was seized, and so the language would be
6 something to the effect of "Was Mr. Hernandez seized?" And
7 that would be question Number 6. And then the remainder of the
8 verdict form will be renumbered.

9 MS. MARTINEZ: All right, Your Honor, I just want to
10 renew my objection that under 1983 my client cannot be held
11 liable for the conduct of someone else, so that's why I asked
12 "seized by Mr. Fitzgerald."

13 THE COURT: Okay. Well, I'm kind of inclined to go
14 with that, but let me just get . . .

15 Yeah, okay. So the one proposal or way to do this is
16 that Number 6 would basically read: "Did Mr. Fitzgerald seize
17 plaintiff Hernandez?" Yes or no. And if yes, of course they
18 continue on. If no, then they can stop right there.

19 As to that modification?

20 MS. MARTINEZ: No objection, Your Honor.

21 THE COURT: Okay.

22 MS. OLIVEROS: I'd like to preserve my objection,
23 Your Honor.

24 THE COURT: Okay. All right. So that's how the
25 verdict form will be drafted.

1 Okay. So I think that covers everything, unless
2 there's anything else.

3 MS. OLIVEROS: Well, Your Honor, in looking at the --
4 Okay. In looking at the color-of-law issue, and I need to
5 really pull these up, but there's -- can I give the Court some
6 case law that an officer -- a police officer -- and this -- and
7 I think we could say a transit officer acts under color of law
8 if he violates state or local law provided he acted with the
9 apparent scope of his authority and office? And that's at
10 Monroe v. Pape, 365 U.S. 167, a 1961 case, Your Honor.

11 Okay. And then there's another similar case that
12 stands for the proposition that a public officer also acts
13 under color of state law when not compelled by law -- I'm not
14 quoting this, Your Honor -- when not compelled by law, he acts
15 with the range of legally authorized discretion in enforcing
16 state and local law. And that's Hague v. CIO, 307 U.S. 496,
17 and that's a 1939 case, Your Honor.

18 I think it's very important that we include in the
19 color of law that local law is included. I believe under the
20 case law that I've seen that it is included, and I've never had
21 a defendant not stipulate to color of law yet in my career, but
22 I think that -- I think because of the transit authority and
23 the questions that we have and that he's a City employee, that
24 we need to make sure that the jury understands that -- they
25 have testimony for color of law, but they need to have the law

1 saying that it applies to a local municipality to be fair.

2 THE COURT: Okay. Anything more on that,
3 Ms. Martinez?

4 MS. MARTINEZ: I don't have anything further.

5 THE COURT: Okay. Let me just -- Did we get the
6 citations? So we'll look at that. I should be able to give
7 you a ruling in the morning. We'll try to do that as soon as
8 possible. And that's as to inserting language relating to
9 color of law beyond what we have there as to the state of
10 New Mexico.

11 Okay. There being nothing else -- Let me just make
12 sure, is there anything else? Nope? Okay.

13 MS. OLIVEROS: Well, Your Honor, we did -- we did
14 file another -- a second Supplemental Jury Instruction 276.

15 THE COURT: All right.

16 MS. OLIVEROS: Document 276. And this was in
17 response to the Court's concern --

18 THE COURT: Oh, yes, right.

19 MS. OLIVEROS: -- with the -- with the testimony --
20 or the question that was asked about the City being a judgment,
21 Your Honor, in reference to 411. So we are -- we have -- In
22 light of the Court's concern and in light of the evidence,
23 we've submitted this supplemental jury instruction, Your Honor.

24 THE COURT: Yeah, I appreciate the proposed
25 instruction. We talked about this having -- We're having some

1 difficulty coming up with something that captures the concern
2 that I had when the question was asked about Mr. Fitzgerald
3 having any, I think, arguable bias because he was terminated by
4 the City. So that came out in examination. The answer -- The
5 question was not answered, but the question I think was
6 certainly out there.

7 MS. MARTINEZ: Yeah, the City would satisfy any
8 judgment against you. And I think, Your Honor, this jury
9 instruction doesn't -- is not in line with the facts of the
10 case because it refers to insurance, and so it just creates a
11 ton of confusion about whether there's insurance and who has
12 insurance, so I think it creates more problems than it solves.
13 And again, I -- I've gone through this to try to figure out
14 what an appropriate limiting instruction would be, and it's
15 really difficult to come up with anything. But I do object to
16 this instruction, Your Honor.

17 THE COURT: So the answer was not given to the
18 question. In other words, Ms. Oliveros asked the question,
19 Mr. Fitzgerald did not answer. I do have already in the
20 instructions that statements, questions, arguments by counsel
21 are not evidence and that the jury must base their verdict only
22 on the evidence and the law.

23 I do have, as I said yesterday, some concerns about
24 what was uttered in the question, and even though it's not
25 technically within the restrictions of Rule 411, it does give

1 the jury at least some inappropriate, improper basis to render
2 a verdict. So that was the -- that's the spirit. That's what
3 I'm referring to as the spirit of 411.

4 And so -- But, nevertheless, as to already -- the
5 jury instructions already have what is clearly that the jury
6 should base their instructions only on the facts in evidence
7 and the law that I give them, then we may not need an
8 additional instruction. So I guess all of that by saying I
9 appreciate the proposed instruction, Ms. Oliveros, but in
10 thinking about it a little bit more, I think the final
11 instructions as currently drafted and that will be given to the
12 jury may address the concern. The jurors are presumed to
13 follow the instructions, and so in that way we may not need
14 that additional instruction. My concern remains the same, but
15 I think given what we have already it may be remedied.

16 Okay. So that's where I'm inclined to go,
17 Ms. Martinez.

18 MS. MARTINEZ: I don't have anything further. Thank
19 you, Your Honor.

20 THE COURT: Okay. All right. So that's what we
21 have. Then we'll be in recess until tomorrow morning.

22 Let me ask the question. As to closing arguments,
23 how much time do you need for entire closing, rebuttal?

24 MS. OLIVEROS: I'd like 45 minutes, Your Honor.

25 THE COURT: Okay. Do you want to reserve 15 minutes

1 of that for rebuttal?

2 MS. OLIVEROS: Yes.

3 THE COURT: Okay. So 30 and 15.

4 Ms. Martinez, you'll have equal time.

5 MS. MARTINEZ: Sure. Thank you.

6 THE COURT: Feel free to use it all. You're not
7 required to do it, but you'll have at least that opportunity.

8 MS. MARTINEZ: Thank you, Your Honor.

9 THE COURT: Okay. We'll be in recess. I'm just
10 going to tidy up here, but you may just carry on. See you
11 tomorrow. Have a good night.

12 (Court stood in recess at 6:20 p.m.)
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1 C-E-R-T-I-F-I-C-A-T-E

2 UNITED STATES OF AMERICA

3 DISTRICT OF NEW MEXICO

4
5 I, Danna Schutte Everett, RPR, CCR, CRR, Official
6 Court Reporter for the State of New Mexico, do hereby
7 certify that the foregoing pages constitute a true
8 transcript of proceedings had before the said Court held
9 in the city of Albuquerque Las Cruces, New Mexico, in the
10 matter therein stated.

11 In testimony whereof, I have hereunto set my hand on
12 this 5th day of June, 2019.

13
14
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